

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

LAUREN HALL, on behalf of herself and
others similarly situated,

No. 18-cv-10500-AET-LHG

Plaintiff,

v.

WELCH FOODS, INC., A COOPERATIVE
and THE PROMOTION IN MOTION
COMPANIES, INC.,

Defendants.

LOCAL RULE 56.1 STATEMENT OF MATERIAL UNDISPUTED FACTS

Plaintiff Lauren Hall, on behalf of herself and others similarly situated (“Plaintiff”), respectfully submits the following Statement of Material Undisputed Facts, pursuant to Local Rule 56.1(a), in support of her Motion for Summary Judgment (the “Motion”) against Defendants Welch Foods, Inc., a Cooperative (“Welch’s”), and The Promotion In Motion Companies, Inc. (“PIM”) (collectively, “Defendants”).

1. PIM is a prominent maker of fruit snacks, fruit rolls, and private label confections and food products, with both domestic and international operations. In addition to the Welch’s Fruit Snacks, PIM’s other proprietary or licensed brands include SUN MAID® Milk Chocolate Raisins, FISHER® Milk Chocolate Peanuts, SOUR JACKS® Sour Candies, NUCLEAR SQWORMS® Sour Neon Gummi

Worms, BUDDY BEARS® and ORIGINAL GUMMY FACTORY® Gummi Candies, and TOGGI® Fine Chocolate Wafers. *See* Declaration of Joshua S. Bauchner, Esq., dated January 25, 2019 (“Bauchner Decl.”), **Exhibit A** at ¶ 17; **Exhibit B** at ¶ 17.

2. PIM licenses the trademarked name “Welch’s” for use with Mixed Fruit Snacks, Island Fruits Fruit Snacks, Reduced Sugar Mixed Fruit Fruit Snacks, Berries ’n Cherries Fruit Snacks, Concord Grape Fruit Snacks, White Grape Raspberry Fruit Snacks, Strawberry Fruit Snacks, Tangy Fruits Fruit Snacks, Fruit Punch Fruit Snacks, White Grape Peach Fruit Snacks, Apple Orchard Medley Fruit Snacks, Strawberry Fruit ’n Yogurt Snacks, Blueberry Fruit ’n Yogurt Snacks, Strawberry Creamy PB&J Fruit Snacks, Strawberry Crunchy PB&J Fruit Snacks, Grape Creamy PB&J Fruit Snacks, Grape Crunchy PB&J Fruit Snacks, Strawberry Fruit Rolls, Berry Fruit Rolls, and Tropical Punch Fruit Rolls (collectively, the “Fruit Snacks”). *See* Bauchner Decl., **Exhibit A** at ¶¶ 1, 17, 19; **Exhibit B** at ¶¶ 17 and 19.

3. In a May 19, 2009 press release announcing the launch of the Island Fruits product line, Michael Rosenberg, President and CEO of Promotion in Motion (“Rosenberg”), claimed, “Like all Welch’s® Fruit Snacks, new Island Fruits is made with Real Fruit and Fruit Juices It’s *a better alternative to lots of other snacks* as it also contains 100% of the daily value of Vitamin C, 25% of the daily value of Vitamins A and E and is fat free. We find that Mom is putting one pack of Welch’s®

Fruit Snacks *Island Fruits* in her kid's lunchbox—and keeping one pack for herself.”

See Bauchner Decl., **Exhibit A** at ¶ 3; **Exhibit B** at ¶ 3; **Exhibit C**.

4. Rosenberg also stated: “When I looked at the fruit snacks segment, all I saw were cartoon-licensed fruit snacks...I believed there was an opportunity for a slightly healthier fruit snack that could be targeted towards both moms and schools.”

See Bauchner Decl., **Exhibit A** at ¶ 27; **Exhibit B** at ¶ 27; **Exhibit D**.

5. Plaintiff started purchasing the Fruit Snacks in approximately 2009 or 2010, and continued to purchase the Fruit Snack packages about once a week for approximately seven years. *See* Bauchner Decl., **Exhibit E** at 69:7-12, 95:7-12.

6. Plaintiff purchased the Fruit Snacks because of the label that read, “Made with Real Fruit,” “vitamins”, and “no preservatives. *See* Bauchner Decl., **Exhibit E** at 69:17-70:2, 80:7-18.

7. Based on these representations, Plaintiff continued to purchase the Fruit Snacks because she thought they were a “better alternative to other fruit snacks” and a “healthier alternative.” *See* Bauchner Decl., **Exhibit E** at 161:10-13, 162:8-13, 163:24-164:11, 165:21-166:1, 169:3-24.

8. Had Plaintiff known that the representations by Defendants were false and misleading, she would not have purchased the Fruit Snacks. *See* Bauchner Decl., **Exhibit E** at 263:21-264:8.

9. Defendants' Fruit Snacks' labels state that, "In this tradition of *wholesome* goodness come Welch's® Fruit Snacks, made with real fruit and fruit juices." *See* Bauchner Decl., **Exhibit A** at ¶ 31 and Illustration 1 (emphasis added); **Exhibit B** at ¶ 31 (emphasis added).

10. Defendants' Fruit Snacks' labels state that they are "Made with Real Fruit," "Fruit is our 1st Ingredient," and "We put the fruit in fruit snacks." *See* Bauchner Decl., **Exhibit A** at ¶¶ 35-37 and Illustrations 2-3; **Exhibit B** at ¶¶ 35-37.

11. Defendants' Fruit Snacks' labels contain images of certain fruit. For example, the Berries 'n Cherries Fruit Snacks contains pictures of strawberries, blueberries, raspberries, and cherries. .". *See* Bauchner Decl., **Exhibit A** at ¶ 36 and Illustration 3; **Exhibit B** at ¶ 36.

12. Defendants' Fruit Snacks' labels state that they contain "100% Vitamin C" and "25% Vitamins A & E." *See* Bauchner Decl., **Exhibit A** at ¶¶ 38, 48, and Illustration 4; **Exhibit B** at ¶ 38 and 48; **Exhibit F** at No. 7; **Exhibit G** at No. 7.

13. Defendants' Fruit Snacks' labels state that they contain "No Preservatives." *See* Bauchner Decl., **Exhibit A** at ¶ 38 and Illustration 4; **Exhibit B** at ¶ 38.

14. Defendants' Fruit Snacks' labels identify the following ingredients: "Ascorbic Acid (Vitamin C), Alpha Tocopherol Acetate (Vitamin E), Vitamin A

Palmitate.” *See* Bauchner Decl., **Exhibit A** at ¶¶ 49, fn. 25, and Illustration 4; **Exhibit B** at ¶ 49.

15. The source of the Vitamin A in the Fruit Snacks is the “Vitamin A Palmitate” ingredient. *See* Bauchner Decl., **Exhibit F** at No. 7; **Exhibit G** at No. 7.

16. The source of Vitamin C in the Fruit Snacks is the “Ascorbic Acid” ingredient. *See* Bauchner Decl., **Exhibit F** at No. 7; **Exhibit G** at No. 7.

17. The source of Vitamin E in the Fruit Snacks is the “Alpha Tocopherol Acetate” ingredient. *See* Bauchner Decl., **Exhibit F** at No. 7; **Exhibit G** at No. 7.

18. [REDACTED]

[REDACTED]

[REDACTED]. *See* Bauchner Decl., **Exhibit H** at 4-5; **Exhibit G** at No. 8.

19. Defendants do not have information or knowledge regarding “the percentages of Vitamins A, C, and E derived from the fruit ingredients versus vitamin enrichment.” *See* Bauchner Decl., **Exhibit F** at No. 9; **Exhibit G** at No. 9.

20. [REDACTED]

[REDACTED]

[REDACTED] *See* Bauchner Decl., **Exhibit H** at 3-4.

21. Following reformulation of the Fruit Snacks in or around 2015, Defendants’ Fruit Snacks’ labels list “fruit puree” as the first ingredient and claim

that “Fruit is our 1st ingredient!” *See* Bauchner Decl., **Exhibit A** at ¶ 46 and Illustration 3; **Exhibit B** at ¶ 46.

22. Defendants have no knowledge or information regarding the percentage of each sub-ingredient used in the “Juice from Concentrates” ingredient utilized in each Fruit Snacks product prior to the reformulation in or around 2015. *See* Bauchner Decl., **Exhibit F** at No. 1; **Exhibit G** at No. 1.

23. Defendants have no knowledge or information regarding the percentage of each sub-ingredient used in the “Fruit Purees” ingredient utilized in each Fruit Snacks product prior to the reformulation in or around 2015. *See* Bauchner Decl., **Exhibit F** at No. 2; **Exhibit G** at No. 2.

24. Defendants have no knowledge or information regarding the percentage of each sub-ingredient used in the “Fruit Puree” ingredient utilized in each Fruit Snacks product subsequent to the reformulation in or around 2015. *See* Bauchner Decl., **Exhibit F** at No. 3; **Exhibit G** at No. 3.

25. The Fruit Snacks contain 0 grams of dietary fiber. *See* Bauchner Decl., **Exhibit A** at ¶¶ 42, 47, 57 and Illustration 4.

26. Plaintiff has an expert report from Professor Jean-Pierre H. Dubé detailing the methodology to be used to calculate damages through a survey to establish the decreased value of the Fruit Snacks when the impermissible label claims are removed. *See* Bauchner Decl. at **Exhibit I**.

27. Defendants' damages expert, Michael Buchanan, testified that a properly constructed and conducted choice-based conjoint survey would permit an analyst to determine the value consumers place on different attributes of a product. *See* Bauchner Decl., **Exhibit J** at 32:6-35:19.

28. Mr. Buchanan further testified that a coefficient logit model would be a scientifically reasonable model to use to estimate consumer preferences based on the conjoint survey results. *See* Bauchner Decl., **Exhibit J** at 35:23-36:9.

29. Mr. Buchanan testified that a Hierarchical Bayesian MCMC algorithm could be a scientifically reasonable means to determine or estimate the preference parameters of consumers. *See* Bauchner Decl., **Exhibit J** at 36:11-37:5.

30. Mr. Buchanan testified that a "willingness to pay" calculation would be a scientifically reasonable methodology for determining a consumer's willingness to pay a certain premium for different claims made about a product. *See* Bauchner Decl., **Exhibit J** at 37:7-21.

31. Finally, Mr. Buchanan testified that the formula models and equations detailed in Appendix A and Appendix B of Professor Dubé's report are scientifically reliable and taught in textbooks. *See* Bauchner Decl., **Exhibit J** at 38:5-39:8.

32. [REDACTED]
[REDACTED]. *See* Bauchner Decl., **Exhibit K** at Exhibits A and C.

33. Plaintiff testified that this action involves “deceptive advertising” claims against Defendants based on misrepresentations on the Fruit Snacks’ labels and that she is seeking to serve as a class representative to act on behalf of other people who purchased Fruit Snacks. *See* Bauchner Decl., **Exhibit E** at 45:5-25, 272:18-23.

Dated: Woodland Park, New Jersey
January 25, 2019

Respectfully submitted

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